

No. 15-55084

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE CENTER FOR AUTO SAFETY,

Intervenor-Appellant,

v.

CHRYSLER GROUP LLC, N/K/A FCA US LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

**RESPONSE BRIEF OF DEFENDANT-APPELLEE
CHRYSLER GROUP LLC, N/K/A FCA US LLC**

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CORPORATE DISCLOSURE STATEMENT

FCA US LLC, formerly known as Chrysler Group LLC, is a wholly owned subsidiary of FCA North America Holdings LLC, formerly known as Fiat North America LLC, a Delaware limited liability company with its principal place of business in New York, New York. FCA North America LLC is wholly owned by Fiat Chrysler Automobiles N.V., a Dutch company whose equity is publicly traded on the New York Stock Exchange.

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INTRODUCTION

It is bedrock Ninth Circuit law that district courts have discretion to maintain under seal documents containing confidential commercial information that were produced in discovery and attached to nondispositive motions. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006); *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002).

This case involves a reasonable exercise of that discretion. In connection with a class-action lawsuit, Chrysler produced a small set of documents containing design specifications and other confidential information concerning the TIPM-7—a component in certain Chrysler vehicles that the class-action Plaintiffs alleged was defective. Chrysler produced these documents in reliance on a protective order entered by the district court that allowed the parties to designate documents containing sensitive commercial or personal information as confidential, and required that such documents be filed under seal.

Plaintiffs moved for a preliminary injunction, attaching as sealed exhibits several discovery documents containing Chrysler's confidential information. In opposing Plaintiffs' motion, Chrysler similarly attached several sealed exhibits to its brief. Before accepting the exhibits for filing under seal, the district court (Pregerson, J.) reviewed their contents and confirmed that they met the standards in the protective order and that there was good cause to permit filing under seal.

Although the district court denied the preliminary injunction, the Center for Auto Safety (“the Center”) moved to intervene and to unseal the discovery documents. Based on its in camera, document-by-document review, the court concluded that there was good cause to maintain the documents under seal.

That decision was reasonable and well within the district court’s ample discretion to enforce the terms of its protective order. The Center is mistaken in arguing that the district court erred by applying a “good cause” standard. This Court has repeatedly recognized—in *Kamakana*, *Phillips* and elsewhere—that exhibits attached to nondispositive motions, such as the motion for a preliminary injunction at issue here, may be maintained under seal based on a showing of good cause. Here, good cause exists because the documents at issue plainly contain “confidential research, development, or commercial information.” Fed. R. Civ. P. 26(c)(1)(G). Certainly the district court did not abuse its discretion in reaching that conclusion.

The district court took a very careful and methodical approach to sealing. It did not blindly accept the parties’ claims that the discovery documents contained confidential information. Rather, the court examined each individual document in camera to determine whether there was good cause to maintain the document under seal. In some instances, the court ordered a particular document unsealed. In other instances, the parties filed a redacted version of the document, thus ensuring that as

much of the document as possible could be placed on the public record. After reviewing the documents, along with a detailed declaration explaining why disclosure of the information in the documents would cause Chrysler competitive harm, the district court held a hearing on the matter and then issued a written opinion giving the specific reasons why the documents (at least for the time being) could remain sealed. The Center offers no reason to conclude that the district court's painstaking document-by-document review and analysis should be deemed an abuse of discretion.

The judgment below should be affirmed.

STATEMENT OF JURISDICTION

Chrysler agrees with the statement of jurisdiction in the Center's opening brief, except that this Court lacks appellate jurisdiction over the district court's denial of the Center's motion to intervene. As explained below, *see infra* n.3, this Court has jurisdiction only if it concludes that the district court abused its discretion in denying the motion. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). Because the district court did not abuse its discretion, this Court lacks jurisdiction over that ruling.

STATEMENT OF ISSUES

1. Whether the district court correctly held that a motion for preliminary injunction is not a “dispositive motion” for purposes of deciding whether to unseal discovery documents attached to that motion.
2. Whether the district court abused its discretion in finding good cause to maintain the discovery documents under seal.

STATEMENT OF THE CASE

Certain Chrysler vehicles are equipped with a device known as a “Totally Integrated Power Module-7.” The TIPM-7 controls and distributes electric power throughout the vehicle. ER 178. Chrysler devoted extensive resources to researching and developing the TIPM-7. ER 266. For that reason, and because disclosure of design and engineering information could give Chrysler’s competitors an advantage in the marketplace, Chrysler is careful to avoid publicly disclosing confidential information about the TIPM-7. ER 266–68. Indeed, Chrysler internally restricts access to sensitive information concerning the TIPM-7 by granting its own employees limited access on a “need to know” basis. ER 269. Chrysler employees are required to protect confidential commercial information and, except as may be required in the course of their official duties, are prohibited from discussing such information with anyone. ER 269.

1. The Class Action Lawsuit And Plaintiffs' Motion For A Preliminary Injunction.

On November 1, 2013, Plaintiffs—certain individuals who own Chrysler vehicles—filed a putative class action against Chrysler, alleging a design defect in the TIPM-7. Because the complaint's allegations implicated sensitive commercial information, the district court entered a stipulated protective order. ER 71. The order authorized either party to “designate any document as ‘Confidential’ . . . if that party and its counsel in good faith believe that the designated restriction is appropriate because the document contains or reflects trade secrets or other confidential research and development, financial, commercial, or personal information.” ER 72. The parties agreed to limit their confidential designations to documents that the “disclosing party in good faith believes will, if disclosed, have the effect of causing harm to its business or competitive position” or of “reveal[ing] personal information.” *Id.* The protective order set forth the procedure for challenging confidentiality designations, and it prohibited the parties from filing any documents that “contain[ed] ‘Confidential’ information” unless the documents were under seal. ER 72–74.

Chrysler produced more than 86,000 documents to Plaintiffs. ER 167. The vast majority of these documents were not designated confidential. However, a small number of these documents contained nonpublic commercial information, including information about the TIPM-7's design. Chrysler nonetheless produced

these documents to Plaintiffs under a confidentiality designation, relying on the protective order entered by the district court. *See* ER 265 (“Chrysler Group has produced, under the Stipulated Protective Order Regarding Confidentiality and Return of Documents, documents that would enable a competitor to appropriate, without cost, design, development, and testing concepts and processes on which Chrysler Group invested significant time and money to develop.”).

On September 18, 2014, Plaintiffs moved for a preliminary injunction. Their motion asked the district court to order Chrysler to send a notice to its customers informing them of the purported defect in the TIPM-7. D.E. 53, 54. Plaintiffs wished to attach as exhibits to their motion several of the confidential documents that they had obtained from Chrysler in discovery. In accordance with the protective order, Plaintiffs moved to file the documents under seal. ER 134–35, 227–28. Chrysler also sought leave to file under seal certain confidential documents that it wished to attach to its brief in opposition. D.E. 63. At no point did Plaintiffs seek to challenge the designation of any of those documents as confidential under the procedure set forth in the protective order. *See* ER 72–74.

The district court reviewed in camera every one of the documents sought to be filed under seal. Based on its document-by-document review, the district court concluded that while most of the documents could be filed under seal because they

contained confidential commercial information, some did not, and thus those documents could not be filed under seal. ER 139–40, 230–31.¹

On October 27, 2014, the court held a hearing on Plaintiffs’ motion for a preliminary injunction and denied the motion from the bench. ER 249.

2. The Center’s Attempt To Unseal Discovery Documents

Several days before the preliminary injunction hearing, the Center moved to permissively intervene for the purpose of seeking access to the documents that had been filed under seal. D.E. 81-1. The Center simultaneously moved to unseal the documents. D.E. 82-1, at 4–12.

In response, Chrysler submitted a declaration from James Bielenda, an electrical engineer and Manager of Product Investigations, Product Analysis for Chrysler. ER 261. Bielenda’s declaration discussed (in general terms) the contents of the documents Plaintiffs sought to unseal, why the documents needed to be kept confidential, and why disclosure of the information in the documents could harm Chrysler in the marketplace. ER 265–70.

¹ The sealed documents included: unredacted versions of the motion for a preliminary injunction, the memorandum in support of the motion, the proposed order granting the motion, the opposition, and the reply; the unredacted declaration of David Stein and Exhibits A–U attached thereto; the unredacted declaration of Rachel Naor and Exhibit P attached thereto; the unredacted declaration of James Bielenda and Exhibits A–D attached thereto; Exhibits B, C, E, F, and Q attached to the declaration of Dylan Hughes; and the parties’ applications and proposed orders regarding the sealing of the aforementioned documents. ER 139, 230; D.E. 64.

The district court held a hearing on the Center's motion to unseal and allowed attorneys for the Center to present argument in support of their request. D.E. 103.

On December 30, 2014, the district court issued a written opinion denying the Center's motion to unseal. ER 1. It held that under well-settled Ninth Circuit precedent, discovery documents attached to a nondispositive motion could be sealed based on a finding of "good cause." ER 5–8. The court rejected the Center's argument that Plaintiffs' motion for a preliminary injunction should be deemed a "dispositive" motion. The court stated that the Center's argument "ignores the plain meaning of the word 'dispositive': motions for preliminary injunction do not actually create any sort of 'disposition,' in the sense of a *final* determination on some issue." ER 6 & n.1 (citing *Black's Law Dictionary's* definition of "disposition" as "[a] final settlement or determination" and its definition of "dispositive" as "bringing about a final determination"). The court further reasoned that even if *some* motions for a preliminary injunction could be deemed "dispositive" in that they mirrored a merits disposition, or would aid in achieving a merits disposition, the motion for a preliminary injunction in *this* case was not such a motion. To the contrary, "[i]n this case . . . the motion was *not* a motion to temporarily grant the relief ultimately sought in the underlying suit." ER 7.

The court then identified the reasons supporting its finding of good cause, focusing on the sensitive commercial information in the documents and the danger that Chrysler could suffer competitive harm from disclosure. ER 8–12. The court cited evidence—the Bielenda declaration—that disclosure “could provide competitors with information about [Chrysler’s] manufacturing and testing processes, specifications, and standards, as well as [its] ‘operational capacity.’” ER 9. “Such information,” the court explained, “could provide competitors with specific guidance as to how to manufacture their own products more efficiently, without having to engage in the expensive research and development that [Chrysler] has already done.” *Id.* The court also recognized the “danger that the wide publication of selected, out-of-context materials, in a matter that is only in the early stages of litigation, could unnecessarily harm [Chrysler] and present an unfair picture of the alleged facts to the public.” ER 10; *see also id.* at 11 (“[T]he Court is leery of creating an environment that would chill free and open communication among Defendant’s engineers, or incentivize the use of closed-door meetings that leave no paper trail.”).²

² The district court also denied the Center’s motion to intervene. The court explained that because “the proposed intervention [was] for the sole purpose of unsealing the documents in question,” and because it was denying the motion to unseal, “[t]here [was] no other reason for [the Center] to be a party to this action.” ER 4.

The court emphasized that its ruling was without prejudice to the Center moving to unseal the discovery documents at a later date:

This is not to say that these documents may never be unsealed, or that identical information will not become available to the public in the course of the litigation . . . The Court emphasizes that this order is limited to the narrow question posed—whether the sealed documents . . . submitted in support of arguments about the motion for preliminary injunction should be unsealed *at this time*. . . . [This] denial is without prejudice, and [the Center] is free to move to intervene again in the event that future motions also present questions of public access to court records.

ER 11–13 (emphasis added).

On March 5, 2015, the parties filed a Notice of Settlement in Principle and Stipulation To Stay Future Deadlines. ER 278. As of April 30, 2015, the parties are finishing a final draft of the settlement agreement and intend to submit it to the district court for approval.

3. The Recall And NHTSA's Investigation

Chrysler had begun its own investigation into the TIPM-7 in 2013, even before Plaintiffs filed their class-action suit. In October 2013, Chrysler became aware that TIPM-7 parts were on national backorder, signaling a potential problem. ER 262. Chrysler's investigation determined that certain 2011 model-year Jeep Grand Cherokee and Dodge Durango vehicles may experience failure in the fuel pump relay (part of the TIPM-7), which could result in the vehicle's stalling or failing to start. *Id.* The cause was identified as a deformation of the contact spring

due to heat caused by contact power, ambient temperature around the fuel pump relay, and battery voltage. ER 262–63.

As a result of its own investigation, on August 26, 2014, Chrysler authorized a recall of 2011 model-year Jeep Grand Cherokees and Dodge Durangos. ER 263. Owners could bring their vehicles to Chrysler dealers so that a more robust fuel pump relay could be installed. *Id.*

Around the same time, the Center petitioned the National Highway Traffic Safety Administration (NHTSA) to initiate a broader defect investigation into the TIPM-7. On September 24, 2014, NHTSA agreed to open a review of the Center’s petition. In mid-October 2014, NHTSA served a request for information on Chrysler, seeking broad categories of documents and information from Chrysler concerning the TIPM-7, including vehicle population, field performance (including all complaints, incidents, and claims), warranty and service data, engineering drawings, returned part analysis, and documents relating to any analyses, testing, and reviews performed by Chrysler to determine the root cause and the scope of the fuel pump relay condition. ER 263–64.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying the Center's motion to unseal.

1. The district court correctly applied Ninth Circuit precedent in deciding the Center's motion under a "good cause" standard. The standard for sealing discovery documents attached to a motion depends on whether the motion is dispositive or nondispositive. Documents attached to a *dispositive* motion may be sealed only if there are "compelling reasons" for doing so. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). Documents attached to a *nondispositive* motion, on the other hand, may be sealed based on a lesser showing of "good cause." *Id.* at 1180. The discovery documents at issue in this case were attached to a motion for a preliminary injunction. A motion for a preliminary injunction is a textbook example of a *nondispositive* motion; it does not "dispose" of the lawsuit, nor does it dispose of any of the parties' claims or defenses. Thus, the "good cause" standard applies.

The Center's arguments for deviating from this Court's well-settled precedent are not persuasive. Although the Center argues that preliminary injunction rulings can have significant consequences, that is beside the point: the test applied in the Ninth Circuit is whether the motion is dispositive. That is a straightforward and workable standard, unlike the various alternative formulations

the Center urges the Court to adopt. *See, e.g.*, Center Br. 26–27 (motion must be “directly relevant to the merits of a case” or “affect people’s lives”). In fact, the motion for a preliminary injunction in this case was *not* closely connected to the merits and was denied in any event. Ordering the disclosure of discovery documents that were produced pursuant to a protective order entered by the district court—and that were filed under seal based on the court’s finding that there was good cause to seal those specific documents—would undercut the power of district courts to enter and enforce meaningful protective orders. And it would disincentivize parties to cooperate in discovery if protective orders could be so easily nullified.

2. The district court did not abuse its discretion in finding good cause. District courts have “broad latitude” “to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information.” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002) (emphasis omitted).

Here, the district court reasonably exercised its broad discretion in examining the documents to confirm that they contained “trade secret[s] or other confidential research, development, or commercial information.” Fed. R. Civ. P. 26(c)(1)(G). The court conducted a painstaking, document-by-document in camera

review, and its conclusions are amply supported by the record, primarily the Bielenda Declaration, ER 261–70, which identifies the contents of the documents and explains why their disclosure would be commercially harmful to Chrysler. The court’s reasoning that the forced disclosure of discovery documents would raise the danger of unnecessary harm to Chrysler, particularly in light of the ongoing NHTSA investigation, provides an additional ground for affirmance.

ARGUMENT

This Court reviews the district court’s denial of the Center’s motion to unseal for abuse of discretion. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 & n.3 (9th Cir. 2006).³ As shown below, the district court did not

³ The denial of the Center’s motion to intervene is also reviewed for abuse of discretion. *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992). This Court has jurisdiction over the district court’s denial of the Center’s motion for permissive intervention “only if the district court abused its discretion in reaching that decision.” *Donnelly v. Glickman*, 159 F.3d 405, 411 (9th Cir. 1998). “[I]n determining its jurisdiction, a reviewing court must—despite the seemingly ‘cart-before-the-horse’ nature of the inquiry—first decide whether the district court abused its discretion in denying the motion.” *Id.* (alteration in original) (quotation marks and emphasis omitted). If this Court finds that the lower court abused its discretion, “it retains jurisdiction and must reverse.” *Id.* (quotation marks and emphasis omitted). But if it finds that no abuse of discretion occurred, “it must dismiss the appeal for want of jurisdiction.” *Id.* (quotation marks and emphasis omitted). Here, because the district court’s denial of the motion to intervene rested on its denial of the motion to unseal, the outcome of the Center’s challenge to the intervention ruling depends on the outcome of its challenge to the unsealing ruling. ER 4.

abuse its discretion in finding good cause to support maintaining certain discovery documents under seal.

I. The District Court Correctly Applied A “Good Cause” Standard.

A. This Court Has Long Applied A “Good Cause” Standard For Sealing Attachments To Nondispositive Motions.

In *Nixon v. Warner Communications, Inc.*, the Supreme Court confirmed the existence of a general common law right “to inspect and copy public records and documents, including judicial records and documents.” 435 U.S. 589, 597 (1978) (footnote omitted). The Court stressed, however, that the common law right “is not absolute.” *Id.* at 598. Access can be denied, for example, “where court files might . . . become a vehicle for improper purposes,” or where they could be used “as sources of business information that might harm a litigant’s competitive standing.” *Id.* Ultimately, the Court said, “the decision as to access is one best left to the sound discretion of the trial court,” the arbiter most familiar with the “relevant facts and circumstances of [a] particular case” and thus most qualified to “balance the competing interests of the public and the party seeking to seal judicial records.” *Id.* at 599, 602; *In re Midland Nat’l Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1119 (9th Cir. 2012) (per curiam).

The Supreme Court has recognized the dangers of granting untrammelled public access to documents and materials obtained in discovery. In *Seattle Times Co. v. Rhinehart*, the Court explained that “pretrial depositions and interrogatories

are not public components of a civil trial.” 467 U.S. 20, 33 (1984). “Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice.” *Id.* (citation omitted). Because “[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying causes of action, . . . restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.” *Id.*

The standard for determining whether to unseal discovery documents attached to a motion depends on whether the motion is dispositive or nondispositive. *Kamakana*, 447 F.3d at 1179. If the discovery documents were filed as attachments to a dispositive motion, the district court may decline to unseal only if it identifies “compelling reasons” to do so. *Id.* If, on the other hand, the discovery documents were filed as attachments to a nondispositive motion, “the usual presumption of the public’s right of access is rebutted,” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002), and the party seeking to “preserve the secrecy” of the sealed record need only show that “good cause” exists to protect the information, *In re Midland*, 686 F.3d at 1119; *see also Oliner v. Kontrabecki*, 745 F.3d 1024, 1026 (9th Cir. 2014) (“[A] less exacting ‘good cause’ standard ‘applies to private materials unearthed during discovery,’ and to ‘previously sealed discovery attached to a nondispositive

motion.”) (quoting *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010)).

This Court has identified many reasons supporting its well-settled “good cause” standard for nondispositive motions. First, “[t]he public policies that support the right of access to dispositive motions, and related materials, do not apply with equal force to non-dispositive materials.” *Kamakana*, 447 F.3d at 1179. A court’s resolution of nondispositive motions often has little bearing on the court’s resolution of the merits of the case, given that nondispositive motions are in many cases “unrelated, or only tangentially related, to the underlying cause of action.” *Id.* (quotation marks omitted).

Second, a “good cause” standard tracks the standard for protective orders enshrined in Federal Rule of Civil Procedure 26(c). That rule provides that a district court may restrict the use or dissemination of documents produced in discovery based on a showing of “good cause.” If litigants could attach documents subject to a protective order to a nondispositive motion—and then argue that “good cause” is not sufficient to maintain the documents under seal—it would “surely undermine, and possibly eviscerate, the broad power of the district court to fashion protective orders.” *Phillips*, 307 F.3d at 1213. As this Court has explained, “it makes little sense to render the district court’s protective order useless simply because the plaintiffs attached a sealed discovery document to a nondispositive . . .

motion filed with the court.” *Id.* Permitting litigants to override protective orders in this way would likely lead to an increase in the filing of meritless motions, as parties might seek to gain leverage in litigation or settlement negotiations by threatening the public release of the other side’s confidential discovery documents that are subject to a protective order. *See* 12/1/14 Tr. 28:5–18 (“[I]t seems too easy to file a lawsuit that . . . lacks any merit [and] to then file a meritless [nondispositive] motion[, and] then all of a sudden, . . . the floodgates open, and a party seeks to publically disclose . . . thousands and thousands of documents . . .”).

Reliance interests are also at stake. When a party produces confidential documents pursuant to a protective order, it reasonably expects that the documents will remain confidential, provided there is good cause for maintaining them under seal. As this Court recognized in *Foltz v. State Farm Mutual Automobile Insurance Co.*, it is “axiomatic” that “[a]mong the goals furthered by protective orders is reducing conflict over discovery and facilitating the flow of information through discovery. Where that has happened, changing the ground rules later is to be avoided because protective orders that cannot be relied upon will not foster cooperation through discovery.” 331 F.3d 1122, 1137 (9th Cir. 2003) (quoting 8A Charles Alan Wright et al., *Federal Practice & Procedure* § 2044.1). If protective orders cannot be relied upon, the consequence will be a substantial increase in

discovery battles, as parties will resist producing the confidential information in the first place.

B. The District Court Correctly Applied A “Good Cause” Standard Because A Motion For A Preliminary Injunction Is A Nondispositive Motion.

The district court used the “good cause” standard to assess the Center’s motion to unseal because the documents at issue had been attached to a motion for a preliminary injunction. That approach was correct.

1. A “dispositive” motion is a motion that “bring[s] about a final determination.” *Black’s Law Dictionary* 572 (10th ed. 2014). A ruling on a preliminary injunction does not result in a final determination on the merits of a claim. To the contrary, it requires a district court merely to consider whether—when the time actually comes for disposing of the claims at issue—the moving party is *likely* to succeed on the merits. A grant or denial of a preliminary injunction does not “dispose” of the parties’ claims or defenses; the ruling does not resolve claims or defenses one way or the other. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007) (“[T]he ruling on the motion for a preliminary injunction leaves open the final determination of the merits of the case.”) (quotation marks omitted); *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004) (“Decisions on preliminary injunctions require the district court to assess the

plaintiff’s likelihood of success on the merits, not whether the plaintiff has actually succeeded on the merits.”). Thus, a motion for a preliminary injunction is not a dispositive motion, and requests to unseal documents attached to a preliminary injunction motion are reviewed under the “good cause” standard.

That conclusion is bolstered by *Kamakana*, where this Court explained that dispositive motions call for “the *resolution* of a dispute on the merits.” 447 F.3d at 1179 (emphasis added). Of course, a motion for a preliminary injunction does not resolve the dispute on the merits. Similarly, in *Foltz*, this Court noted that a dispositive motion “adjudicates substantive rights and serves as a substitute for trial.” 331 F.3d at 1135 (quotation marks omitted). A motion for a preliminary injunction does not adjudicate substantive rights and does not serve as a substitute for trial. Although motions to dismiss and motions for summary judgment fall within the definitions of “dispositive motion” that this Court provided in *Kamakana* and *Foltz*—in that they can resolve the dispute and substitute for a trial—a motion for a preliminary injunction plainly does not.⁴

⁴ The Center contends that “the term ‘nondispositive motion’ is simply shorthand for motions that are not ‘of major importance to the administration of justice.’” Center Br. 28 (quoting *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984)). Not only would that interpretation contradict *Kamakana* and *Foltz*, it is not even what the First Circuit said. The First Circuit’s opinion does not mention the words “dispositive” or “nondispositive.”

Consistent with this Court’s guidance, district courts within this Circuit have held that, for purposes of public access, a motion for a preliminary injunction is a nondispositive motion. *See, e.g., Hanginout, Inc. v. Google, Inc.*, 2014 WL 1234499, at *1 (S.D. Cal. Mar. 24, 2014); *In re Nat’l Sec. Agency Telecomm. Records Litig.*, 2007 WL 549854, at *3–4 (N.D. Cal. Feb. 20, 2007); *see also Reilly v. MediaNews Grp. Inc.*, 2007 WL 196682, at *4–5 (N.D. Cal. Jan. 24, 2007) (applying the good cause standard to documents attached to a motion for a temporary restraining order). Whereas the Center notes that there are some district courts that have taken a different approach, *see* Center Br. 29, those decisions cannot be squared with the many decisions from this Circuit holding that the good cause standard applies to nondispositive motions, such as motions for a preliminary injunction. Indeed, some of those district court decisions expressly acknowledge that a motion for preliminary injunction is “not a dispositive motion,” *see, e.g., FTC v. AMG Servs., Inc.*, 2012 WL 3562027, at *1 (D. Nev. Aug. 15, 2012), but then erroneously fail to apply the good cause standard.⁵

⁵ In fact, in examining whether there was good cause to maintain the discovery documents under seal, the district court in this case actually applied a *more* rigorous standard than is required under Ninth Circuit precedent. In *Phillips*, this Court held that where a district court has *already* made a good cause determination in allowing documents to be filed under seal, the burden shifts to the party demanding disclosure to identify “compelling reasons” for unsealing. *See Phillips*, 307 F.3d at 1213 (“[W]hen a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public’s right of access is

2. The Center concedes that under Ninth Circuit law, there is an “exception [to the presumption of public access] for sealed discovery documents attached to nondispositive motions.” Center Br. 24. But the Center inexplicably contends that the exception “does not apply here at all”—even though there can be no genuine dispute that the documents at issue are “sealed discovery documents” that were “attached to [a] nondispositive motion.” *Id.* The Center’s arguments are not persuasive.

First, the Center notes that some of the sealed materials are briefs and pleadings, rather than “discovery documents,” so any test limited to “discovery documents” should not apply. Center Br. 24. This argument is misplaced because the “good cause” standard is not limited to “discovery documents”; rather, it applies to all attachments to nondispositive motions. Moreover, to the extent that limited portions of briefs and pleadings in this case were maintained under seal, those portions quoted from or described the contents of the sealed discovery documents. It would make no sense to keep a discovery document under seal, while at the same time unsealing a pleading that quotes from or otherwise

rebutted, so that the party seeking disclosure must present sufficiently compelling reasons why the sealed discovery document should be released.”). Here, the district court made a good cause determination when it reviewed the documents and permitted the parties to file them under seal. ER 139–41, 230–31. Thus, the burden shifted to the Center, which was required to identify “compelling reasons” for unsealing. It plainly did not do so.

reproduces the confidential information from the sealed document. *See* ER 12 (“[B]ecause it would be nonsensical to carefully exempt the discovery document from disclosure, only to allow full disclosure of citations to it in a briefing paper,” the “same standard applies to the discovery documents and to the references to them in the briefs and declarations.”).

Next, the Center argues that preliminary injunction motions often involve the merits of the case and can have “tremendous consequences” for the parties. Center Br. 26. But that is not always the case, and is beside the point in any event because the test this Court has faithfully adhered to for many years is whether the motion is “dispositive”—*not* whether it involves the merits of the dispute or could have “tremendous consequences.” *See, e.g., Oliner*, 745 F.3d at 1026; *In re Midland*, 686 F.3d at 1119; *Pintos*, 605 F.3d at 678; *Kamakana*, 447 F.3d at 1179–80; *Foltz*, 331 F.3d at 1135–36; *Phillips*, 307 F.3d at 1213.

The dispositive/nondispositive standard makes good sense. It provides a workable, bright-line rule that can be readily applied—in contrast to the various amorphous alternative tests the Center proposes in its brief. *See, e.g.,* Center Br. 26 (motion must be “directly relevant to the merits of a case”); *id.* (motion must have “tremendous consequences”); *id.* at 27 (motion must “affect people’s lives”); *id.* at 28 (motion must be “of major importance to the administration of justice”) (quotation marks omitted). Even if a panel of this Court were free to overrule a

prior line of Ninth Circuit decisions, which of course it is not, it would make little sense to replace the workable dispositive/nondispositive test with something that would create confusion and generate litigation.

The Center relies on three cases decided by other circuits to argue that there should be a presumptive right of access to discovery documents attached to preliminary injunction motions. Center Br. 29. But each of those cases was decided in a circuit that does not distinguish between dispositive and nondispositive motions in public-access cases—an approach that this Court has consistently rejected.⁶

⁶ The Center notes that the pre-trial matters over which a magistrate judge lacks jurisdiction are often referred to as “dispositive” matters and that magistrate judges are not authorized to decide motions for injunctive relief. Center Br. 28 n.6. But that is the result of the relationship between 28 U.S.C. § 636, the statute known as the Magistrates Act, and Federal Rule of Civil Procedure 72. The Magistrates Act, which sets forth the jurisdiction of magistrate judges, divides pretrial matters into two categories. The first category, which comprises the matters a magistrate judge has the authority to consider, includes any “pretrial matter pending before the court” except for eight exceptions, which constitute the second category (a list that includes motions for injunctive relief). *See* 28 U.S.C. § 636. Rule 72, which outlines a magistrate judge’s procedural responsibilities, also divides pretrial matters into two categories, but it does not track the language of the Magistrates Act. Instead, it divides pretrial matters into two categories: dispositive and nondispositive. Given the significant overlap between the statute and the Rule, courts have taken to using “dispositive” as a “vernacular buzzword” to “refer[] to the eight subsections listed in § 636(b)(1)(A),” even though “the term ‘dispositive’ is found nowhere in § 636(b).” 12 Charles Alan Wright et al., *Federal Practice & Procedure* § 3068.2 n.5. Moreover, this Court has explained that the proper approach for determining whether a magistrate judge may consider a motion that is not mentioned in Section 636 is to “look to the effect of the motion, in order to

Finally, the Center’s emphasis on the general benefits of allowing public access to court filings misses the mark. Center Br. 26–27. Applying a “good cause” standard to discovery documents attached to nondispositive motions does not mean these documents are automatically barred from public scrutiny. To the contrary, they are public documents unless a court finds that good cause exists to justify sealing. In the extreme hypotheticals the Center provides—*e.g.*, denying a preliminary injunction that would halt an execution (*id.* at 27)—a district court may very well conclude that good cause is absent because the public interest outweighs any privacy interests.

3. Even if one were to jettison the common understanding of “dispositive motion” and accept the Center’s argument that *some* preliminary injunction motions could qualify as “dispositive” motions, the preliminary injunction motion in *this* case would not pass the test. For one thing, it was not closely connected to the merits and it sought a form of relief—requiring Chrysler to send letters to its customers notifying them of the alleged defect—that was not necessary to enable the district court to make a final adjudication on the merits. As the district court explained, “[i]n this case . . . the motion was *not* a motion to temporarily grant the relief ultimately sought in [the] underlying suit; rather it was a request to send

determine whether it is properly characterized as dispositive or non-dispositive of a claim or defense of a party.” *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1068 (9th Cir. 2004) (quotation marks omitted).

notice of potential problems with Defendant's vehicles to thousands of purchasers." ER 7–8. Indeed, Plaintiffs themselves acknowledged that their preliminary injunction request was divorced from the merits of their claims. *See* ER 98 (arguing that issuing a preliminary injunction “would avoid pre-judging the merits of the parties’ dispute” and that “[t]he issue of who is at fault and who should pay for TIPM replacements can await a full trial on the merits”). Moreover, the motion “involved evidence and issues which may ultimately not factor into the underlying case,” and “the prosecution of the main case did not turn on the outcome of the motion; the case could easily have continued without the motion ever being filed at all.” ER 8.

In addition, the district court *denied* the motion for a preliminary injunction. Thus, to the extent disclosure may sometimes be warranted to help the public understand the reasons for an exercise of judicial power, in this case the documents did not furnish the basis for the exercise of judicial power. To the contrary, the district court *declined* to exercise its equitable power because (among other reasons) it did not see anything in the documents that would require Chrysler to notify its customers of a safety issue.

The Center's brief attempts to create the image that disclosure of the discovery documents is critical to ensuring public safety. That is false. In fact, there is no evidence of a *single* confirmed accident or injury related to the TIPM-7

in *any* vehicle. ER 168. Given that approximately **5 million** vehicles equipped with some version of a TIPM-7 component have been on the roadways since 2007, *id.*, this total absence of evidence is striking.

* * *

Chrysler reasonably relied on the district court's entry of a protective order governing its production of documents containing confidential commercial information. ER 265. Chrysler further relied on the district court's specific determination that there was good cause to file the discovery documents at issue under seal. ER 139–41, 230–31. A ruling that “good cause” is not enough to *maintain* those documents under seal would frustrate that reliance, disincentivize parties from cooperating in discovery, and all but eliminate the power of the district courts to enter meaningful protective orders. As this Court has warned, “changing the ground rules later is to be avoided because protective orders that cannot be relied upon will not foster cooperation through discovery.” *Foltz*, 331 F.3d at 1137 (quotation marks omitted).

II. The District Court Did Not Abuse Its Discretion In Finding Good Cause.

The question whether a party has established “good cause” for keeping sensitive discovery documents sealed is entrusted to the “sound discretion” of the district court because of its close proximity to and intimate familiarity with the “relevant facts and circumstances of the particular case.” *Nixon*, 435 U.S. at 599.

District courts have “broad latitude” “to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information.” *Phillips*, 307 F.3d at 1211 (emphasis omitted); *see id.* at 1211–12 (describing the “many types of information” courts have the discretion to maintain under seal); *see also Kamakana*, 447 F.3d at 1180 (emphasizing that district courts have “much flexibility” when “balancing and protecting the interests of private parties” to make disclosure decisions).

Here, the district court conducted precisely the kind of “conscientious[] balanc[ing]” test this Court has mandated. *Foltz*, 331 F.3d at 1135. First, the court approved and entered the parties’ stipulated protective order. ER 72 (authorizing the parties to designate discovery documents as confidential only if they “contain[] or reflect[] trade secrets or other confidential research and development, financial, commercial, or personal information”).

Then, the district court reviewed the specific documents at issue when the parties moved to file them under seal. ER 139, 230; D.E. 64. The court did not blindly accept the confidentiality designations. Rather, it conducted a document-by-document in camera review and approved filing under seal only when it determined there was good cause for doing so. *See* ER 230–51 (declining to seal certain documents the parties had sought to file under seal).

The district court again reviewed the documents when it denied the Center’s motion to unseal. ER 8–9. Its reasoning was faithful to the approach this Court has mandated. The district court considered Chrysler’s interests in keeping the discovery documents sealed, and weighed those interests against the public interest in disclosure. ER 8–11; *see Phillips*, 307 F.3d at 1213 (directing courts to “balanc[e] the needs for discovery against the need for confidentiality”). Having considered the competing interests, the district court reasonably concluded that Chrysler had established good cause for keeping the documents sealed.⁷

The good cause standard for unsealing mirrors the good cause standard set forth in Federal Rule of Civil Procedure 26, the rule that authorizes a district court to enter a protective order in the first place. Under that Rule, a district court may keep documents under seal to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including,” as relevant

⁷ The Center halfheartedly presents a First Amendment argument in a footnote. Center Br. 19 n.4. This Court has never resolved the question whether the First Amendment right of access applies to documents filed in a civil proceeding, and the district court did not discuss the issue. *See San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1102 (9th Cir. 1999) (“We leave for another day the question of whether the First Amendment also bestows on the public a prejudgment right of access to civil court records.”); *see also Hagestad v. Tragesser*, 49 F.3d 1430, 1434 n.6 (9th Cir. 1995) (explaining that it was “unnecessary to reach” the First Amendment question and noting that “[n]either the Supreme Court nor this Circuit has ruled on the issue in the context of a civil trial or records in civil cases”). There is no need to reach that question here, when the district court did not pass on it.

here, “requiring that a trade secret or other *confidential research, development, or commercial information* not be revealed or be revealed only in a specified way.”

Fed. R. Civ. P. 26(c)(1)(G) (emphasis added).

The district court acted well within its broad discretion in denying the Center’s motion to unseal. The Bielenda Declaration, ER 261–70, provides a detailed factual basis sufficient to support the district court’s determination as to each of the documents at issue.

- Stein Decl., Exhibit A is a Chrysler Group presentation that describes the type of testing that was conducted on the recalled Chrysler vehicles, the results of that testing, and ongoing testing.
- Stein Decl., Exhibit B describes the engineering performance standards for the TIPM-7, including the mechanical details and performance requirements for the TIPM-7. It also outlines the recommended practices for testing the TIPM-7.
- Stein Decl., Exhibit C is a presentation that describes research on the failure rates of the TIPM-7 and analyzes trends across those failure rates. It also includes engineering test data and photographs of the insides of TIPM-7s.
- Stein Decl., Exhibit D is an internal email thread discussing research regarding the TIPM.
- Stein Decl., Exhibit E is a TIPM-7 test proposal involving the fuel pump relay that was provided by Continental, the supplier of the TIPM-7. It summarizes confidential research and development information.
- Stein Decl., Exhibit F is a warranty analysis graph tracking the performance of the TIPM-7.
- Stein Decl., Exhibit G is an internal email thread discussing test data done on Chrysler vehicles.

- Stein Decl., Exhibits I and J are internal email threads discussing engineering group processes and strategies.
- Stein Decl., Exhibit K is an internal email thread discussing research and development.
- Stein Decl., Exhibit L is an internal email thread between Chrysler Group and the TIPM-7 supplier, Continental. The emails discuss specific product testing procedures and research in connection with the investigation that led to the recall of certain Chrysler vehicles.
- Stein Decl., Exhibit M is an engineering change notice that describes the evolution of the design of the TIPM-7—specifically, when changes were made to the TIPM-7, what changes were made, and why those changes were made. It also discusses the design and manufacturing process of the TIPM-7.
- Stein Decl., Exhibit N is an internal email thread discussing testing, research, and development.
- Stein Decl., Exhibit O is an internal email thread between Chrysler Group and the TIPM-7 supplier, Continental. The emails discuss specific product testing procedures and research in connection with the investigation that led to the recall of certain Chrysler vehicles.
- Stein Decl., Exhibit P is a Chrysler Group transmittal about TIPM-7 issues in the field and the investigation that led to the recall of certain Chrysler vehicles. In particular, it discusses the specific technical steps that Chrysler took to resolve TIPM-7 issues in the recalled vehicles.
- Stein Decl., Exhibit R is an internal email thread discussing one particular Chrysler vehicle and its repair history.
- Stein Decl., Exhibit S is an internal email thread between Chrysler Group and the TIPM-7 supplier, Continental. The emails discuss specific product testing procedures and research in connection with the investigation that led to the recall of certain Chrysler vehicles.

- Stein Decl., Exhibit T is an internal email thread that contains engineering discussions.
- Hughes Decl., Exhibit F is a Part Matrix that contains ten categories of information about the TIPMs used in Chrysler vehicles from 2010 to 2015, and Exhibit E is an internal email related to that Part Matrix.
- Unredacted Briefs and Declarations (D.E. 53, 54, 56, 57, 65, 66, 73, 74): All of these documents discuss, in detail, the contents of the exhibits described above.

See generally ER 261–70.

The documents identified above contain “confidential research, development, or commercial information,” Fed. R. Civ. P. 26(c)(1)(G), sufficient to establish the good cause necessary to maintain them under seal. *See* ER 265 (Bielenda: “The information includes engineering standards, engineering changes notices, and documents reflecting testing and analysis to ascertain the root cause and remedy for the TIPM-7 fuel pump relay issue that is the subject of the recall. Chrysler Group has a specific, serious, and substantial interest in protecting these documents.”). The district court recognized that disclosing the information at issue could enable Chrysler’s competitors to gain an unfair advantage in the marketplace. ER 9. Indeed, Chrysler has expended significant resources to compile the proprietary information these documents contain and should not be compelled to disclose this information to its competitors simply because its litigation opponent attached that information to a nondispositive motion. *See*

Nixon, 435 U.S. at 598 (explaining that the “common-law right of inspection has bowed before the power of a court to insure that its records are not used . . . as sources of business information that might harm a litigant’s competitive standing”) (quotation marks omitted).

The Center questions whether all of these documents contain trade secrets. Center Br. 36–40. But trade secrets are only one type of proprietary information that the courts are authorized to protect; the Center ignores the second half of the list in Rule 26(c)(1)(G): “trade secret[s] *or other confidential research, development, or commercial information.*” (emphasis added). Indeed, the district court’s conclusion is perfectly consistent with the types of rulings district courts make every day. *See, e.g., Hanginout, Inc.*, 2014 WL 1234499, at *1 (finding “good cause” where disclosing information “would put Google at a competitive disadvantage because it would reveal information about Google’s advertising expenditures, the scope and reach of certain products offered by Google, and the amount of time and money Google has invested in the creation of certain products”); *Davis v. Soc. Sci. Coordinators, Inc.*, 2012 WL 1940677, at *3 (E.D. Cal. May 29, 2012) (finding good cause “where the disclosure of proprietary information could cause . . . competitive injury”); *Goldenberg v. Indel, Inc.*, 2012 WL 15909, at *3 (D.N.J. Jan. 3, 2012) (“The court finds there is a legitimate privacy interest in preventing these exhibits which contain confidential business

agreements, sensitive financial information and private email exchanges from being available to the general public.”).

The district court identified an additional reason justifying maintaining the documents under seal: the unfairness to Chrysler if its confidential information were publicly revealed at the same time NHTSA is conducting its own investigation. The district court noted that the case remained “in the early stages of litigation,” and that forced disclosure of discovery documents would raise the “danger that the wide publication of selected, out-of-context materials . . . could unnecessarily harm [Chrysler] and present an unfair picture of the alleged facts to the public.” ER 10. Moreover, the court expressed concern that if its protective order were not honored, it would “creat[e] an environment that would chill free and open communication among [Chrysler’s] engineers, or incentivize the use of closed-door meetings that leave no paper trail.” ER 11. The court was careful to underscore that its ruling on unsealing was not final, explaining that “[t]his is not to say that these documents may never be unsealed, or that identical information will not become available to the public in the course of the litigation.” *Id.* The court noted that a more demanding standard for keeping materials sealed would likely apply in the event the Center filed a renewed motion, and it “emphasize[d] that this order is limited to the narrow question posed—whether the sealed

documents submitted in support of arguments about the motion for preliminary injunction should be unsealed *at this time.*” ER 12 (emphasis added).

Where, as here, “[t]he judge took seriously” the application of the good cause standard, “and did so in accord with precedent from the Supreme Court and this [C]ourt,” this Court “will not second guess the exercise of the [district court’s] considerable discretion” in deciding whether to unseal discovery documents. *Kamakana*, 447 F.3d at 1187 (quotation marks omitted).

CONCLUSION

The Court should affirm the judgment of the district court.

Dated: April 30, 2015

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Appellee knows of no related cases currently pending in this Court.

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